

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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UNITED STATES OF AMERICA,

Case No. 2:14-cr-00079-KJD-PAL

Plaintiff,

**REPORT OF FINDINGS AND
RECOMMENDATION**

v.

BRYON QUACKENBUSH,

(Mot. Suppress – Dkt. #45)

Defendant.

Before the court is Defendant Bryon Quackenbush's Motion to Suppress (Dkt. #45) which was referred to me for a Report of Findings of Recommendation pursuant to 28 U.S.C. § 636(b)(1)(B) and LR IB1-4. The court has considered the Motion, the government's Response (Dkt. #50), and evidence taken at an evidentiary hearing conducted September 1, 2015¹. Brett Whipple appeared on behalf of the Defendant, and Allison Herr on behalf of the government.

BACKGROUND

The Defendant, Bryon Quackenbush ("Quackenbush") is charged in an indictment filed March 5, 2014, with receipt of child pornography in violation of 18 U.S.C. § 2252A(a)(2). The indictment arises out of a federal arrest warrant for Riley "Blake" Lively executed at an apartment on 3001 Lakes Dr., #220, in Las Vegas, Nevada on February 20, 2014.² Quackenbush

¹ An evidentiary hearing was originally scheduled for July 27, 2015, however, the parties stipulated to continue the hearing based on the unavailability of a critical witness who was on military duty and not available until after the week of August 10, 2015.

² The motion repeatedly refers to a search warrant. However, the 302 attached as Exhibit A to the motion and testimony of FBI Special Agent Bugni make it clear that officers initially went to the apartment to arrest Lively on an arrest warrant. Quackenbush was questioned after Lively was removed. After Quackenbush made incriminating statements, Bugni called an AUSA and the decision was made to arrest Quackenbush and obtain a federal search warrant based on Quackenbush's admissions.

1 and his roommate, Lively, were in the apartment at the time officers gained access. Lively was
2 placed under immediate arrest. According to the motion, during the next two hours, federal
3 agents questioned Quackenbush who made incriminating statements that he was attracted to
4 children and had received child pornography from Robert Norwood consisting of pictures of
5 Norwood's younger brothers' genitals and media of Norwood and his brothers engaged in oral
6 sex. Quackenbush allegedly admitted that he and Norwood exchanged pictures and descriptions
7 of Norwood's sexual activities with his eight and eleven-year-old brothers and made other
8 admissions prior to *Miranda* warnings.

9 **I. The Parties' Positions.**

10 In the current motion Quackenbush seeks to suppress his statements arguing they were
11 taken in violation of his Fifth and Fourteenth Amendment Rights. Quackenbush maintains that
12 he was subjected to custodial interrogation before *Miranda* warnings were administered.
13 Additionally, he argues that the government cannot meet its burden of proving by a
14 preponderance of the evidence that his statements were voluntary. The circumstances of this
15 case indicate that government conduct made it impossible for Quackenbush to make a rational
16 choice about whether or not to confess. Quackenbush was in custody at the time he made his
17 statements, the interrogation occurred inside his living room, and officers had focused their
18 investigation on him. All indicia of an arrest were present. The length and form of the
19 questioning demonstrate he was subjected to custodial interrogation and the questions were
20 interrogatory in nature.

21 The government opposes the motion arguing Quackenbush was not subjected to custodial
22 interrogation, and therefore, *Miranda* warnings were not required. The government's written
23 opposition asserted the agent who questioned Quackenbush "is believed to have erred on the side
24 of caution and advised Quackenbush of the *Miranda* warnings." However, the government
25 argues that, even if the court finds Quackenbush was not advised of *Miranda* warnings, his
26 incriminating statements are still admissible because he was not subjected to custodial
27 interrogation as a matter of law, which means "express questioning or its functional equivalent."
28 In this case, the government asserts that Quackenbush was only handcuffed for a few minutes

1 and only as long as necessary to address safety during the execution of the arrest warrant for
2 Lively. Quackenbush was not handcuffed at the time of questioning. He was in his own home in
3 a comfortable environment with only two officers in his immediate vicinity. He was aware of
4 why the officers were present, told he was not under arrest, and did not have to speak with them.
5 He was not tricked or coerced. Rather, the agents told Quackenbush about the warrant for his
6 roommate's arrest, and advised him of the nature of the investigation.

7 Agents on the scene asked Quackenbush for consent to preview the computers and
8 explained what they were looking for. According to the agents' reports, Quackenbush
9 voluntarily offered information.

10 **II. Testimony at the Evidentiary Hearing.**

11 The government called Special Agent Nicholas Bugni and rested. After the government
12 rested, counsel for Quackenbush requested an opportunity to confer with his client and the court
13 took a short recess. Following the recess, counsel and Mr. Quackenbush indicated Quackenbush
14 had decided to testify. The court canvassed Quackenbush concerning his understanding of his
15 right to testify, and his right not to testify. Quackenbush acknowledged that he had discussed the
16 matter with his counsel, and that it was his decision after conferring with counsel to testify.

17 **A. Testimony of Special Agent Bugni.**

18 Bugni is employed by the FBI and has been involved in law enforcement for
19 approximately eight-and-a-half years. He is currently assigned to the Child Exploitation Task
20 Force. On February 20, 2014, he was involved in the arrest of Lively in Las Vegas. He had no
21 involvement in the investigation that led up to the arrest warrant. The warrant was referred to the
22 Las Vegas FBI as a result from a lead from Detroit. The investigation involved a Robert
23 Norwood. Bugni knew a little bit about the Detroit investigation and was given brief facts about
24 Norwood. The arrest warrant for Lively was issued out of Michigan. The information he had
25 about Quackenbush was that it was believed Quackenbush had traveled to Detroit, Michigan
26 with Lively and Norwood, and that Quackenbush had been involved in an incident involving a
27 juvenile while there.

1 Bugni was part of the arrest team for Lively which consisted of eight agents. Agents
2 went to their apartment, a second story two-bedroom apartment in a fairly large apartment
3 complex. Bugni's primary role was to serve on the arrest team, and his secondary role was to
4 interview Quackenbush after Lively's arrest. It was presumed Quackenbush and Lively lived
5 together based on information received from Detroit.

6 This was a low key arrest warrant because there was no indication that either of the
7 roommates were a high risk. In these circumstances, officers try to minimize the law
8 enforcement exposure in a high density apartment area to minimize risk, keep people safe and
9 therefore carry minimal weapons. The officers who knocked on the door wore button-down
10 shirts and jeans or khakis. They wore concealing garments over their weapons. Bugni believed
11 the officers who approached the door used a repairman ruse. To his recollection, no weapons
12 were drawn during any point in the encounter. After a brief conversation at the door confirmed
13 that Lively was present, the arrest warrant was executed.

14 Bugni remained at the bottom of the stairwell on the first floor while three officers went
15 up to the second floor landing. One officer acted as cover and two went to the door. Both
16 Quackenbush and Lively were temporarily detained while the residence was secured.
17 Quackenbush's temporary detention was for officer safety until the "safety clear" of the
18 apartment was conducted. Typically, suspects are told to stand until the safety check is finished.
19 A safety check consists of looking for other people in the apartment and anything that would hurt
20 officers such as weapons or knives. He estimated it took less than three to five minutes to
21 complete the safety check. Lively was positively identified and given an opportunity to dress,
22 get his identification and then transported to jail by Special Agents Castillo and Flaherty. Four
23 officers stayed behind after Lively was taken to jail. Quackenbush was taken out of handcuffs
24 immediately after the safety check was completed. Officers reentered the apartment and stayed
25 in the family room/dining room area. Three agents were inside and one was outside the door.

26 Bugni described his own demeanor as monotone. By the time officers reentered the
27 apartment, everything had deescalated. Bugni explained officers were at the apartment to arrest
28 Lively and asked Quackenbush if he was willing to answer questions. There was no shouting,

1 raised voices, or weapons drawn during the encounter. Quackenbush was told he could leave
2 after Bugni explained why officers were there, and asked if he was willing to answer questions.
3 Bugni sat down in the dining room area. He believed he pulled a milk carton or something else
4 to sit on so that he was not standing over Quackenbush while talking to him. Quackenbush was
5 told he was not under arrest or in custody and he was free to leave. He was also told that if he
6 did not want to answer any questions, Bugni's feelings would not be hurt. The other two officers
7 were in the family room/dining room area. One was approximately five feet away and the other
8 was approximately ten feet away.

9 Bugni told Quackenbush what the point of the interview was, and the types of questions
10 Michigan wanted answered. Specifically, Quackenbush's involvement, if any, with Lively in the
11 April 2009 trip to Michigan. Other than this, Bugni had no other facts at that time about the
12 Michigan investigation involving Norwood or Lively. From Bugni's perspective, the point of
13 the interview was to indicate whether Quackenbush was involved with Lively. Bugni had not
14 opened an investigation of Quackenbush.

15 Bugni told Quackenbush that Lively was arrested for a child exploitation investigation
16 out of the state of Michigan. Bugni initially tried to establish rapport with Quackenbush by
17 asking questions about how long he had known Lively, what he did for a living and what his
18 relationship with Lively was. Quackenbush said that he and Lively worked from home for
19 AT&T. This explained the amount of computers and computer equipment in the apartment.

20 Bugni asked Quackenbush whether he had traveled to Michigan. Quackenbush initially
21 denied it. Bugni told Quackenbush he was aware of a specific incident involving Quackenbush's
22 encounter with a law enforcement officer and a young juvenile in April 2009 in Michigan.
23 Quackenbush responded "Oh, you know about that." After this, Quackenbush became more
24 forthcoming and answered questions in a little more detail. Quackenbush admitted Norwood
25 sent him child pornography and gave information to Bugni which led to probable cause for a
26 potential search warrant. Quackenbush was cooperative by showing Bugni a computer on which
27 he received child pornography. The computer Quackenbush showed Bugni was in a closet and
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1 not plugged in. Quackenbush pulled it out of his closet and identified it as the one on which
2 Norwood sent him child pornography.

3 After refreshing his recollection from his 302, Bugni recalled that Quackenbush said he
4 and Norwood met online in a chat room and continued conversation via Yahoo Messenger.
5 Bugni did not administer *Miranda* warnings to Quackenbush because Quackenbush was not
6 under arrest. Bugni's process was to get information regarding Quackenbush's relationship to
7 Lively. During the interview Quackenbush also said he was present during a sexual encounter
8 between Lively and Norwood's younger brothers. Once Quackenbush admitted to contraband
9 being sent, officers decided there was probable cause for a search warrant and conferred with the
10 U.S. Attorney's Office.

11 After speaking with the U.S. Attorney's Office, Bugni was told Quackenbush could be
12 arrested for aiding and abetting, and the decision was made to arrest Quackenbush on probable
13 cause for aiding and abetting the Michigan crime.

14 The arrest warrant for Lively was served at approximately 9:00 a.m. on February 20,
15 2014. Quackenbush was transported to the Henderson Detention Center by 11:00 a.m. to 11:30
16 a.m., indicating officers were at the scene approximately 2 to 2 ½ hours. Bugni estimated that
17 his interview of Quackenbush took "probably an hour, give or take." At no time during the
18 interview did Quackenbush ask the officers to leave, get agitated or upset, or refuse to answer
19 questions. Bugni described Quackenbush as very cooperative. The interview was not tape
20 recorded as this was not standard FBI operating procedure at the time. That policy has now
21 changed. It was also not standard FBI operating procedure to administer *Miranda* warnings
22 because Quackenbush was not in custody and Bugni was not conducting a custodial interview.

23 On cross-examination, Bugni reiterated that he did not provide *Miranda* warnings or see
24 anyone else administer Quackenbush *Miranda* warnings while officers were in the apartment.
25 Bugni remained at the bottom of the stairwell with other officers while the three officers initially
26 approached the door to the apartment. Bugni could not overhear the conversation of the officers
27 who knocked on the door. Bugni was aware the officers who knocked were going to use some
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1 type of ruse. He thought it was some time of a maintenance ruse, such as a water leak, but he
2 was not there and did not really know.

3 At the threshold of the door, both Lively and Quackenbush were placed in temporary
4 custody while a safety clear was done. He estimated that Quackenbush's handcuffs were
5 removed after three-to-five minutes. Lively was able to gather clothes or shoes and
6 identification before he was transported to jail. Bugni entered the apartment just briefly as part
7 of the safety clear. He did not recall observing Quackenbush in cuffs.

8 Before entering the apartment to serve the arrest warrant, Bugni had been briefed about
9 the Michigan investigation. He was told that Lively and Quackenbush had traveled to Michigan
10 in April 2009. Detroit believed Quackenbush was with Lively on the trip. An officer's report
11 indicated Quackenbush had been stopped with a juvenile boy in Michigan.

12 Bugni could not recall the exact charge on the arrest warrant for Lively. He believed it
13 had something to do with child pornography. Bugni asked Quackenbush questions about
14 traveling to Michigan for child pornography purposes because the interview led there, but it was
15 not his initial purpose in interviewing Quackenbush when he first began questioning him.

16 Bugni did not recall if Quackenbush was uncuffed before Lively was taken out of the
17 apartment, but testified that cuffs were removed immediately after the safety sweep was
18 completed. Bugni did not begin questioning Quackenbush until after Lively was removed. He
19 told Quackenbush that the purpose of officers being there was to arrest Lively. He reiterated that
20 the purpose of the officers being at the apartment was to arrest Lively, and his secondary purpose
21 was to interview Quackenbush. Bugni first asked Quackenbush background questions such as
22 where he lived and worked, then asked about the computers and trip to Michigan. After Bugni
23 realized Quackenbush was not being honest about traveling to Michigan, he confronted
24 Quackenbush with his encounter with law enforcement. He estimated this was towards the
25 middle of the interview.

26 Bugni did not give *Miranda* warnings to Quackenbush because Quackenbush was still
27 not in custody. Bugni denied that he told Quackenbush his status would depend on how he
28 answered questions. Bugni could not recall asking Quackenbush about a boy in the

1 neighborhood named Tim or Timothy who might be in danger or telling Quackenbush that he
2 had a choice to make. Bugni's 302 did not make any reference to a Tim or Timothy, and he did
3 not recall any such conversation. He understood from Agent Flaherty that there was someone in
4 the neighborhood, but this was not something Bugni was asked to clarify with Quackenbush.
5 Bugni denied that he told Quackenbush that if Quackenbush chose to say nothing, they would
6 take him to jail. Bugni denied that he told Quackenbush that his answers could help to prevent
7 his arrest. Bugni did not recall whether Quackenbush asked if he was going to be arrested. At
8 the beginning of the interview, it was explained to Quackenbush why Bugni and other officers
9 were there—to arrest Lively. Bugni denied that officers used fake wanted posters as a ruse at the
10 door. Bugni did not ask Quackenbush for consent to search the computer. He did not recall if
11 anyone else did so. Quackenbush showed Bugni a computer. The computer that Quackenbush
12 showed Bugni was left in the hall until a search warrant was obtained, at which time it was
13 seized and searched. Bugni walked with Quackenbush to retrieve the computer in a back
14 hallway. Bugni could not recall where the other two officers inside the apartment were. He is
15 sure they moved around during the hour they were in the apartment while Bugni was asking
16 Quackenbush questions.

17 Bugni acknowledged that the answers to questions he asked Quackenbush were used to
18 obtain the search warrant. The information he received from Quackenbush also provided
19 probable cause for Quackenbush's arrest. Quackenbush never asked if he could leave, but was
20 told he was free to leave. Bugni did not indicate to Quackenbush that he was going to be placed
21 in custody or tell him the consequences of lying. Bugni denied that he told Quackenbush that if
22 Quackenbush talked to him, he would let Quackenbush go. Bugni testified that would make no
23 sense because Quackenbush was free to leave at any time. Bugni had no intention of placing
24 Quackenbush in custody that day. Bugni was not aware until after talking with the AUSA that
25 Quackenbush could be arrested for aiding and abetting the Michigan crime. As Bugni talked
26 with Quackenbush, he developed probable cause to believe child pornography was on the
27 computer. Once Quackenbush admitted to being present in a room as sex acts were occurring
28 "that raised a whole different concern" about Quackenbush's danger to the community.

1 Quackenbush was not taken into custody that day until after the interview was completed and
2 after Bugni had called AUSA Christina Silva.

3 **B. Testimony of Bryon Quackenbush.**

4 Quackenbush testified that on the morning of February 20, 2014, he was taken into
5 custody and arrested at the end of the interview with Agent Bugni. He recalled answering the
6 door when the officers knocked. He was not immediately handcuffed. He was handcuffed after
7 officers showed him the wanted posters and they confirmed that Lively was in the apartment.
8 The wanted posters consisted of a sheet of paper with two adults on them—a female and a male.
9 Officers asked if Quackenbush knew anything about them. Lively was just getting up and
10 Quackenbush called him to the door. Lively looked at them after Quackenbush asked him if he
11 knew these people. Both he and Lively were then handcuffed and secured while the safety
12 sweep was done. After that, Quackenbush was taken to the kitchen. At some point, the
13 handcuffs were taken off. Quackenbush did not feel he was free to leave. He was led by the arm
14 by an agent to the front room. A second agent was at the door. At no time did he feel free to
15 leave the apartment. He sat in an office chair because he was told to sit there. He was facing
16 towards the kitchen and towards the three agents who were between Quackenbush and the
17 hallway. At one point, Quackenbush tried or started to get up. He noticed one of the officers
18 tensing up which suggested, by the officer's body language, that he should not get up, so he sat
19 back down.

20 Quackenbush was not told he was under arrest until the end of the questioning. Other
21 officers besides Bugni questioned him. Three officers were present observing. Quackenbush did
22 not recall whether all of the officers asked questions. He believed so but did not “want to go on
23 the record saying they did.” He was questioned about a Timothy or Tim, a child in his
24 neighborhood who may be in danger. Once he was placed in the front room, Quackenbush was
25 told he was not under arrest. However, he was told how long that remained true depended on
26 him. He was told he had two choices: one, remain silent and follow his roommate to jail; or two,
27 assist the officers in answering questions about Tim or Timothy. He was told he could be
28 arrested, lose his job and everything in his apartment.

1 On cross-examination, Quackenbush testified that three officers were in the apartment
2 during the interview. The officers were three adult white males. Quackenbush testified his
3 vision was not that good because his eyes were partially paralyzed at birth and his resolution was
4 reduced so he sees fewer sharp details. The officers were wearing street clothes and he estimated
5 they were in their mid-20s. Quackenbush was never told he could freely leave, but was told he
6 had the option of remaining silent and which point he could go to jail.

7 DISCUSSION

8 **I. Requirement for *Miranda* Warnings.**

9 The government's written opposition to the motion to suppress argued that *Miranda*
10 warnings were not required because Quackenbush was not subjected to custodial interrogation.
11 However, government counsel believed that one of the officers administered *Miranda* warnings
12 "out of an abundance of caution." At the conclusion of Special Agent Bugni's testimony,
13 government counsel indicated she obtained her understanding that *Miranda* warnings were
14 possibly given from another agent while Bugni was unavailable on military leave. The
15 government therefore withdrew its assertion that *Miranda* warnings were given.

16 *Miranda* warnings are necessary when a suspect in custody is interrogated by police. *See*
17 *Thompson v. Keohane*, 516 U.S. 99, 102 (1995). In *Rhode Island v. Innis*, 446 U.S. 291 (1980),
18 the Supreme Court defined interrogation as "express questioning or its functional equivalent."
19 446 U.S. at 300-01. If *Miranda* warnings are required, the government must establish, by a
20 preponderance of the evidence, that a defendant waived his protection against self-incrimination
21 under *Miranda*. *Colorado v. Connelly*, 479 U.S. 157, 158 (1986).

22 The Supreme Court and courts of appeal have repeatedly emphasized that many types of
23 questions are not considered interrogation and do not require *Miranda* warnings. For example,
24 questions asked of a motorist temporarily detained in a traffic stop do not require *Miranda*
25 warnings. *See Berkemer v. McCarty*, 468 U.S. 420, 439 (1984) (quoting *United States v.*
26 *Brignoni-Ponce*, 422 U.S. 873, 881 (1975)). Asking a suspect questions regarding general
27 biographical information is not interrogation. *United States v. Foster*, 227 F.3d 1096, 1103 (9th
28 Cir. 2000).

1 After Bugni testified, the government conceded that *Miranda* warnings were not given to
2 Quackenbush. The court must therefore determine whether Quackenbush was subjected to
3 custodial interrogation.

4 II. Custodial Interrogation.

5 *Miranda v. Arizona* held that pre-interrogation warnings are required when a suspect in
6 custody is interrogated because of “the compulsion inherent in custodial surroundings.” 384
7 U.S. at 458. The *Miranda* decision defined “custodial interrogation” as “questioning initiated by
8 law enforcement officers after a person has been taken into custody, or otherwise deprived of his
9 freedom of action in any significant way.” *Id.* at 444. Whether a person is in custody for
10 purposes of the requirement to administer *Miranda* warnings is determined by examining the
11 objective circumstances of the interrogation. *Stansbury v. California*, 511 U.S. 318, 322 (1994)
12 (quoting *California v. Beheler*, 463 U.S. 1121, 1125 (1983)). The *Stansbury* court explained that
13 “the initial determination of custody depends on the objective circumstances of the interrogation,
14 not on the subjective views harbored by either the interrogating officers or the person being
15 questioned.” *Id.* at 323.

16 Courts determining whether a person has been subject to custodial interrogation must
17 examine “all of the circumstances surrounding the interrogation” and determine “how a
18 reasonable person in the position of the individual being questioned would gauge the breadth of
19 his or her freedom of action.” *Id.* at 322, 325. (Internal quotation marks and alteration omitted.”
20 In *Thompson v. Keohane*, 516 U.S. 99 (1995), the Supreme Court described the two inquiries
21 lower courts must make to determine whether a suspect is in custody for purposes of the
22 necessity to administer *Miranda* warnings. First, courts should examine the circumstances
23 surrounding the interrogation. 516 U.S. at 112. Second, the court must examine whether, under
24 the circumstances surrounding the interrogation, a reasonable person would have felt he or she
25 was not at liberty to terminate the interrogation and leave. *Id.* The court emphasized this is an
26 objective test and the ultimate inquiry is whether there was a formal arrest or “restraint on
27 freedom of movement to the degree associated with a formal arrest.” *Id.* at 112. (Internal
28 quotation marks and footnote omitted.)

1 The Supreme Court has not mandated consideration of any particular circumstances in
2 the custodial interrogation inquiry. Rather, courts are required to “examine all of circumstances
3 surrounding the interrogation” *Stansbury*, 511 U.S. at 322, including any circumstance that
4 “would have affected how a reasonable person” in the suspect’s position “would perceive his or
5 her freedom to leave.” *Id.* at 325. In *Yarborough v. Alvarado*, 541 U.S. 652, 667, the Supreme
6 Court explained that the objective custody is “designed to give clear guidance to the police” and
7 does not involve examining the “actual mindset” of the particular suspect subjected to police
8 questioning. The Supreme Court has recognized that any police interview of an individual
9 suspected of a crime has “coercive aspects to it.” *Oregon v. Mathiason*, 429 U.S. 492, 495
10 (1997) (*per curiam*). However, by examining the objective circumstances of the interrogation,
11 and inquiring how a reasonable person in the suspect’s position would understand his or her
12 freedom to terminate questioning and leave, the objective test “avoids burdening police with the
13 task of anticipating the idiosyncrasies of every individual suspect and defining how those
14 particular traits affect each person’s subjective state of mind.” *J.D.B. v. North Carolina*, 131 S.
15 Ct. 2394, 2402 (2011).

16 In the Ninth Circuit, the issue of whether a Defendant was subjected to custodial
17 interrogation is a mixed question of law and fact which is reviewed *de novo*. *United States v.*
18 *Kim*, 292 F.3d 969, 973 (9th Cir. 2002). The district court’s factual findings are reviewed for
19 clear error. *Id.*

20 The Ninth Circuit has held that a defendant is in custody if a “reasonable innocent person
21 in such circumstances would conclude that after brief questioning, he or she would not be free to
22 leave.” *United States v. Booth*, 669 F.2d 1231, 1235 (9th Cir. 1991). The Ninth Circuit has
23 identified five on exclusive factors relevant to the custody determination. These include: (1) the
24 language used to summon the individual; (2) the extent to which the individual is confronted
25 with evidence of guilt; (3) the physical surroundings of the interrogation; (4) the duration of the
26 detention; and (5) the degree of pressure applied to detain the individual. *Id.* at 974. These
27 factors are illustrative and not exhaustive. *Id.* The court’s ultimate decision is whether a
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1 reasonable innocent person would have believed he or she could freely walk away from
2 interrogating officers. *Id.*

3 Here, three officers knocked on the door of the apartment Quackenbush shared with
4 Lively employing a ruse of some sort to determine if Lively was in the apartment. It is
5 undisputed that Quackenbush answered the door and called Lively to the door. Once officers at
6 the door confirmed Lively was in the apartment, the officers entered the apartment, handcuffed
7 both Quackenbush and Lively, and conducted a safety sweep of the apartment. Bugni estimated
8 it took three to five minutes to conduct the safety sweep after which Quackenbush was uncuffed.
9 Lively was positively identified and given an opportunity to obtain his clothing and identification
10 and transported to jail by two of the officers. Three of the officers stayed behind and reentered
11 the apartment remaining in the family room and dining room area while a fourth agent remained
12 outside the door.

13 Bugni explained to Quackenbush why the officers were there and asked Quackenbush if
14 he was willing to answer questions. Bugni testified he sat down in the dining room area, pulling
15 a milk carton or something else to sit on so that he was not hovering over Quackenbush while
16 talking to him. Quackenbush testified that he was not immediately handcuffed when the officers
17 knocked on the door. He was only handcuffed after officers showed him wanted posters and
18 confirmed Lively was in the apartment. At that point, both he and Lively were handcuffed while
19 the safety sweep was completed. Quackenbush testified that the handcuffs were taken off “at
20 some point” and he was led by the arm by an agent to the front room while another agent was at
21 the door. He was told to sit in an office chair and was facing towards the kitchen and towards
22 the three agents who were nearby. The court found Quackenbush credible in this regard.
23 Although Quackenbush was not ordered to sit in a chair, he was led by the arm from the kitchen
24 to the family room/dining room area and directed to sit in the chair. The first *Kim* factor weighs
25 in favor of finding that Quackenbush was in custody.

26 Examining the second *Kim* factor, the extent to which the defendant was confronted with
27 evidence of guilt, the court finds that this factor weighs against finding the interview was a
28 custodial interrogation. Quackenbush was not confronted with evidence that he engaged in any

1 criminal activity. In fact, Bugni knew very little about the Detroit investigation resulting in the
2 arrest warrant for Lively. The only facts about the Detroit investigation that Bugni had relevant
3 to Quackenbush was that Detroit investigators believed Quackenbush had traveled to Michigan
4 in 2009 with Lively, and had been involved in law enforcement contact as a result of an incident
5 with a juvenile. Bugni acknowledged that when Quackenbush denied he had traveled to
6 Michigan with Lively in 2009, he confronted Quackenbush with his law enforcement contact in
7 Michigan related to the juvenile. According to Bugni, after he did so, Quackenbush responded
8 “oh, you know about that” and became more forthcoming and answered questions in more detail.
9 After Bugni confronted Quackenbush with his knowledge about contact with a police officer in
10 Michigan where he was caught with a juvenile boy in the woods, Quackenbush began to answer
11 questions admitting he and Lively traveled to Michigan and had contact with a person named
12 Robert. However, Quackenbush does not claim that he was accused of any criminal misconduct
13 involving the night he was caught in the woods with the juvenile, only that the incident was
14 documented. Quackenbush does not claim that he was confronted with any other evidence of
15 criminal misconduct during the interview. Quackenbush went on to make a series of
16 incriminating admissions that ultimately resulted in his arrest and an application for a search
17 warrant for the apartment.

18 The Ninth Circuit has found a defendant in custody when the interrogator adopts an
19 aggressive coercive and deceptive tone. *United States v. Bassignani*, 573 F.3d 879, 994 (9th Cir.
20 2009). Here, the court found Bugni credible when he described his demeanor in approaching
21 Quackenbush as “monotone.” The court also found Bugni credible that there was no shouting or
22 raised voices, that Bugni asked Quackenbush if he was willing to answer questions, and
23 Quackenbush agreed. Quackenbush did not dispute this testimony in his own testimony. The
24 court also found Bugni credible that his initial questions were low key background questions
25 intended to build rapport, the entire interview lasted approximately one hour, and Bugni told
26 Quackenbush he could leave and was not under arrest. Quackenbush does not dispute Bugni’s
27 testimony that no weapons were drawn at any point during the encounter.
28

1 The third *Kim* factor, the physical surroundings of the interview, weighs in favor of
2 finding the interview was not a custodial interrogation. It was conducted in the familiar
3 surroundings of Quackenbush's apartment. There was no testimony that Quackenbush ever
4 requested to leave, or that his movements were restricted. At most, Quackenbush testified that
5 he was initially led by the arm from the kitchen to the living room and directed to sit in a chair,
6 and that at one point, he tried or started to get up and sensed one of the officers tensing which
7 caused him to sit down. His testimony did not specify whether he actually stood up, tried to
8 stand up, or what type of movement he made that resulted in one of the officers "tensing." He
9 did not describe what he meant in any further detail. He does not claim that Bugni was the
10 officer who "tensed," or that any officer instructed him to remain seated or physically restricted
11 his movements.

12 Quackenbush did not dispute that at one point during the interview, he told Bugni about
13 receiving child pornography from Norwood and offered to retrieve the computer from another
14 room. Bugni testified that he accompanied Quackenbush to the hallway where Quackenbush
15 retrieved the computer and showed it to Bugni. Quackenbush does not claim that he asked to get
16 up at any point during the interview, or that any of the three officers inside the apartment
17 restricted his movements.

18 Bugni testified that his primary purpose that day was to arrest Lively on the warrant, and
19 his secondary role was to interview Quackenbush about his involvement, if any, with Lively, in
20 the April 2009, trip to Michigan. Bugni knew little about the Michigan investigation, had not
21 opened up an investigation of Quackenbush, and only asked follow up questions suggested by
22 Quackenbush's answers. Bugni did not have a warrant for Quackenbush's arrest, and had no
23 plans to arrest Quackenbush until after the conclusion of the interview when he conferred with
24 AUSA Silva and was told Quackenbush could be arrested on probable cause for aiding and
25 abetting the Michigan crime based on his admissions. Quackenbush himself testified that he was
26 not told he was under arrest until after the end of the interview.

27 Turning to the fourth *Kim* factor, the duration of the detention, Quackenbush was only
28 briefly detained for three to five minutes after arresting agents confirmed Lively was in the

1 apartment, entered to arrest Lively, and conducted a safety sweep of the apartment.
2 Quackenbush was expressly told that he was not under arrest and told he was free to leave.
3 Quackenbush admitted in his testimony that he was told he was not under arrest at the beginning
4 of the interview, and was not told that he was under arrest until the end of the interview.

5 Finally, the fifth *Kim* factor, the degree of pressure used during the interview, weighs in
6 favor of finding Quackenbush was not in custody. Although Quackenbush testified he was told
7 he was not under arrest, he also testified he did not feel free to leave and was never told he could
8 “freely leave.” Quackenbush also testified that he was told he had two choices. He could remain
9 silent and go to jail like his roommate, or assist officers by answering questions about a Tim or
10 Timothy. Bugni denied that he told Quackenbush that he had these two choices or that
11 Quackenbush’s status depended on how he answered questions. Bugni also denied asking
12 Quackenbush about a boy in the neighborhood named Tim or Timothy who might be in danger
13 and telling Quackenbush that he had a choice to make. The court found Bugni credible in this
14 regard. Bugni had some recollection that Agent Flaherty had information about a juvenile in the
15 neighborhood but he did not recall asking Quackenbush about it and his 302 makes no reference
16 to such a line of questioning.

17 The court found Quackenbush credible that he did not subjectively feel he was free to
18 leave. However, the Supreme Court has made it clear that the court must apply an objective test
19 and determine how a reasonable innocent person in Quackenbush’s position would perceive his
20 or her freedom to leave. Quackenbush’s subjective state of mind is not relevant to the court’s
21 objective determination of whether a reasonable person in Quackenbush’s position would
22 perceive his freedom to leave the apartment or terminate questioning.

23 The Ninth Circuit has consistently held that perhaps the most significant factor for the
24 court to consider in resolving the question of custody is whether the defendant was expressly told
25 that he was not under arrest. *See United States v. Crawford*, 372 F.3d 1048, 1060 (9th Cir.
26 2003); *United States v. Norris*, 428 F.3d 907, 912 (9th Cir. 2005). Quackenbush admits he was.
27 The Supreme Court has repeatedly emphasized that the determination of whether a person is in
28 custody for purposes of the requirement to administer *Miranda* warnings depends on the

1 objective circumstances of the interrogation, not on the subjective views harbored by either the
2 interrogating officers or the person being questioned. Quackenbush was asked whether he was
3 willing to answer questions and agreed. The interview took place in Quackenbush's own
4 apartment. Although Quackenbush was directed to sit in a chair, Quackenbush does not claim
5 that he was told to remain seated, claim that he asked to get up at any point other than to retrieve
6 the computer from the hallway, or that his movements were restricted during the interview.

7 Quackenbush was not confronted with evidence of his guilt of any crime. At most, he
8 was confronted with lying about whether he traveled to Michigan with Lively in 2009. Bugni
9 did not know enough about the Michigan investigation to confront Quackenbush with evidence
10 of guilt in the Michigan investigation. Rather, Bugni asked follow up questions suggested by
11 Quackenbush's admissions. The interview took place in the familiar surroundings of his own
12 living room/dining room area. The court found Bugni credible that the overall tenor of the
13 interview was low key. Quackenbush was asked preliminary questions about how long he had
14 lived in Las Vegas, how long he had known Lively, where he worked, and similar background
15 questions before being confronted with lying about traveling to Michigan with Lively in 2009.

16 In short, the court finds under a totality of the circumstances that Quackenbush was not
17 subjected to a restraint of his movements to a degree associated with formal arrest such that a
18 reasonable innocent person in his circumstances would conclude that he was not free to leave or
19 terminate the encounter. The court therefore finds the interview was not a custodial interrogation
20 for which *Miranda* warnings were required.

21 **III. Voluntariness.**

22 The government has the burden of proving, by a preponderance of the evidence, whether
23 a confession is voluntary. *See Lego v. Twomey*, 404 U.S. 477, 489 (1972).

24 A statement is voluntary where it is "the product of a rational intellect and free will."
25 *See United States v. Kelley*, 953 F.2d 562, 564 (9th Cir. 1992) (*citing Blackburn v.*
26 *Alabama*, 361 U.S. 199, 208 (1960)). In examining the voluntariness of a confession, the
27 court must consider "whether, under the totality of the circumstances, the challenged
28 confession was obtained in a manner compatible with the requirements of the Constitution."

1 *See Derrick*, 924 F.2d at 817. In addition, the Supreme Court has determined that coercive
2 police activity is a necessary predicate to a finding that a confession is not voluntary.
3 *See Connelly*, 479 U.S. at 167. It is the government's burden to prove that a confession was
4 voluntary by a preponderance of the evidence. *See United States v. Jenkins*, 958 F.2d 934, 937
5 (9th Cir. 1991) (citing *Lego v. Twomey*, 404 U.S. 477, 489 (1972)); *Connelly*, 479 U.S. at 168.

6 To determine whether a confession is voluntary, the court applies a totality of the
7 circumstances test. *See United States v. Leon Guerrero*, 847 F.2d 1363, 1366 (9th Cir. 1988).
8 The court determines whether, "considering the totality of the circumstances, the government
9 obtained the statement by physical or psychological coercion, or by improper inducement so
10 that the suspect's will was overborne." *Id.* In assessing the voluntariness of a confession, the
11 court considers "the totality of all the surrounding circumstances—both the characteristics of
12 the accused and the details of the interrogation." *Gifferson v. United States*, 530 U.S. 428, 434
13 (2000).

14 Here, Quackenbush claims that he was coerced into making incriminating statements by
15 statements Bugni made that he had two choices-- essentially either cooperate and answer
16 questions, or go to jail like his roommate. The court found Bugni credible that he did not make
17 these threatening or coercive statements. Bugni had no evidence to confront Quackenbush about
18 involving Lively's crimes, and knew little about the Michigan investigation. Quackenbush
19 recalled being questioned about a boy in the neighborhood named Tim or Timothy who may be
20 in danger. Bugni recalled something about Special Agent Flaherty's concern about a juvenile in
21 the neighborhood, but did not recall questioning Quackenbush about this subject at all. Flaherty
22 is one of the two agents who left the apartment to transport Lively to jail. Bugni's 302 contains
23 a detailed account of the subject matter areas on which Quackenbush was questioned, and the
24 incriminating responses he gave, but contains no reference to questioning about a Tim or
25 Timothy.

26 Considering the totality of the circumstances, the court finds the government has met its
27 burden of showing by a preponderance of the evidence that Quackenbush's statements were
28 voluntary and not the product of physical or psychological coercion which overcame his will.

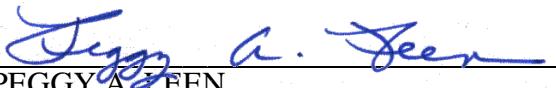
CONCLUSION

Examining the totality of the circumstances and applying the objective test mandated by the Supreme Court, the court finds that Quackenbush was not subjected to custodial interrogation. *Miranda* warnings were therefore not required. The court also finds the government has met its burden of establishing that Quackenbush's statements to Bugni were voluntary.

For these reasons,

IT IS RECOMMENDED that Quackenbush's Motion to Suppress (Dkt. #45) be **DENIED**.

DATED this 30th day of September, 2015.


PEGGY A. LEEN
UNITED STATES MAGISTRATE JUDGE